IN THE

Supreme Court of the United States

October Term, 1971

No. ——, October Term, 1971

71-1134

HARRY ROADEN, ----------PETITIONER

versus

COMMONWEALTH OF KENTUCKY, ----------RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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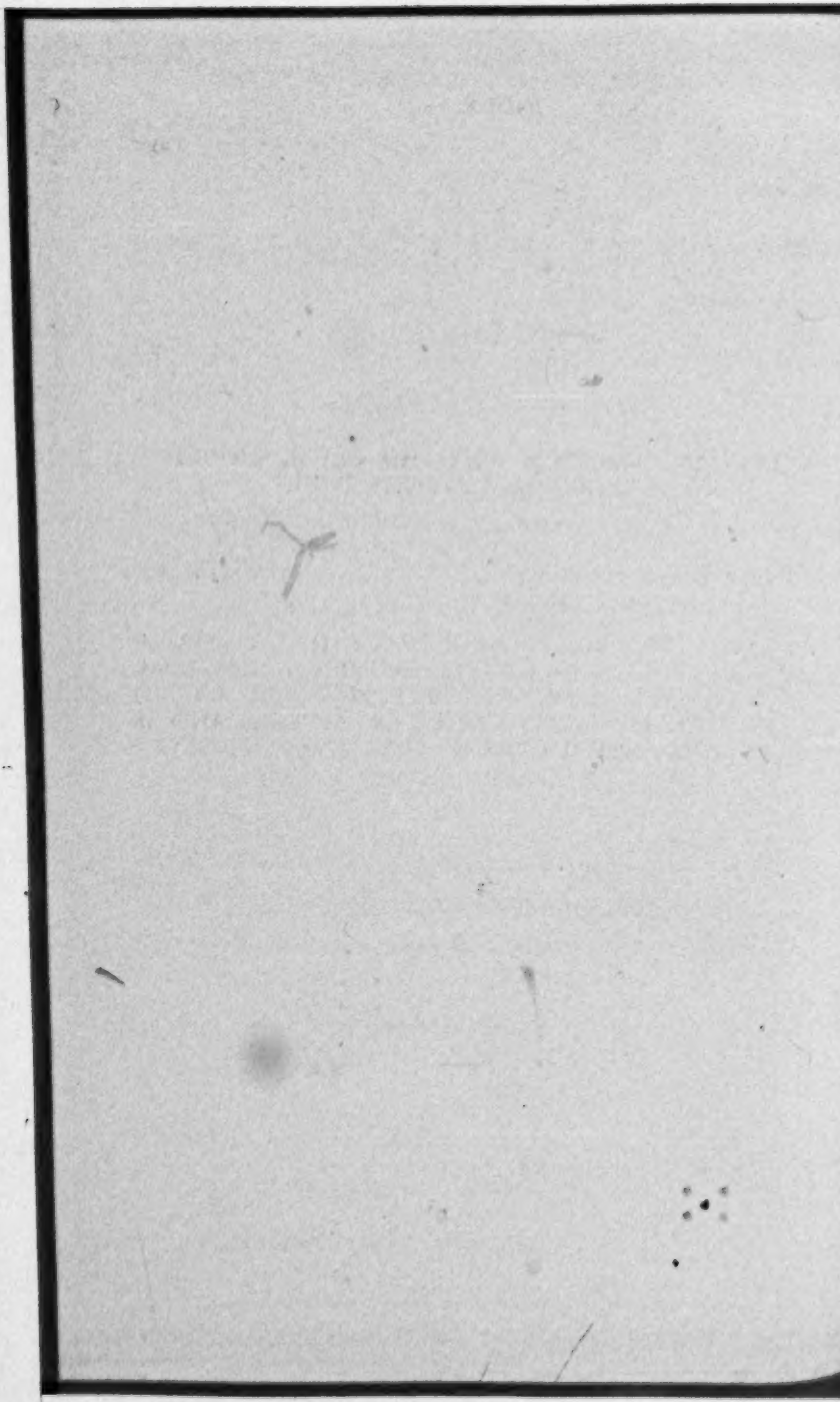

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OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled "Harry Roaden v. Commonwealth of Kentucky" and is reported at 473 S.W.2d 814 (1971).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C., Sect. 1257(3).

QUESTIONS PRESENTED

1. IS THERE A SUBSTANTIAL FEDERAL QUESTION PRESENTED FOR REVIEW BY THIS COURT AS A RESULT OF THE SEIZURE OF THE OBSCENE FILM INCIDENTAL TO A LAWFUL ARREST, AND ITS ADMISSION INTO EVIDENCE.

2. WAS THE CLAIM THAT THE PROSECUTION FAILED TO PROVE THE ELEMENTS ENUNCIATED IN REDRUP V. NEW YORK PROPERLY RAISED BEFORE THE KENTUCKY COURT OF APPEALS AND IS IT PROPERLY BEFORE THIS COURT.

STATEMENT OF THE CASE

Petitioner is appealing a decision of the Kentucky Court of Appeals which affirmed a judgment of the Pulaski Circuit Court which, after trial by jury, found the Petitioner guilty of violation of Kentucky Revised Statutes Chapter 436, Section 101, and set the punishment at $1,000 fine and six months in jail. (Transcript of Record, page 15).

This prosecution involved the Kentucky obscenity statute (KRS 436.101), and the showing of an obscene motion picture, entitled "Cindy and Donna." On September 29, 1970, the Sheriff of Pulaski County and the Prosecuting Attorney for that district purchased tickets to the Highway Drive-In Theater, which is located in Pulaski County. (Transcript of Evidence [hereinafter referred to as T.E.] pps. 20, 21; 31). The Sheriff viewed the entire film and proceeded to the projection booth, where he arrested Petitioner on the charge of exhibiting an "obscene" film to the general public. (T.E. 21, 22). As part of the arrest the Sheriff seized the film (T.E. 22, 24), and during the trial the Court overruled a motion by Petitioner to suppress and film as evidence on the ground that it was illegally seized, and admitted the film into evidence. (Transcript of Record page 7 and T.E. p. 4). It should be pointed out that although Petitioner moved to suppress the film as evidence, he did not move the Court for a return of the film. During the course of the trial, the jury was permitted over Petitioner's objection to view the evidence (T.E. pps. 36-41).

As noted by the Kentucky Court of Appeals in its decision in this case (473 S.W.2d 814 at 815):

"It was conceded by Roaden's counsel in closing argu-

ment to the jury that the film is obscene. No issue is presented on the appeal as to the obscenity of the material."

MATTERS AND GROUNDS WHY THIS CASE SHOULD NOT BE REVIEWED BY THIS COURT

I

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED FOR REVIEW BY THIS COURT BY THE SEIZURE OF THE OBSCENE FILM INCIDENTAL TO A LAWFUL ARREST, AND ITS ADMISSION INTO EVIDENCE.

Petitioner made the motion to suppress the evidence and dismiss the indictment because he contended that the evidence was unlawfully seized. This motion was properly overruled. Petitioner's main reliance is upon the U. S. Supreme Court cases of *Marcus v. Search Warrants*, 367 U.S. 717, 6 L.Ed. 2d, 1127, 81 S.Ct. 1708 (1961), and *A Quantity of Copies of Book v. Kansas*, 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964). Both of these cases can be distinguished from the present factual situation, since in both instances peace officers in those cases seized large quantities of books pursuant to state statutes which permitted the seizure of allegedly obscene publications and their later destruction. This Court in those two cases held that the seizure of this large quantity of material was unlawful, absent a prior adversary hearing. In the present case, one copy of a film was seized incidental to a lawful arrest for a crime which was committed in the officer's presence.

The First Amendment to the United States Constitution protects freedom of speech in this country. The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Both of these freedoms must be jealously guarded. Neither of these freedoms, however, should be used as a means of frustrating legitimate prosecutions and thereby protection of the general public. Both *A Quantity of*

Books and the *Marcus* cases point out the evil inherent in the wholesale seizure of publications which are alleged to be obscene. In such cases, the possibility exists that legitimate publications might be seized and destroyed as a means of oppressing dissident views. The same reasoning would hold true for the wholesale seizure of motion picture films. In the present case, however, petitioner has not complained that his right to freedom of expression has been interfered with by the seizure of a film which is not obscene, but rather complains that an obscene film which was seized as an incident to an arrest was admitted into evidence. At no time during the proceedings does the record show that petitioner moved for a return of the evidence so that he might continue to show it at the motion picture theater.

The motion by petitioner appears to have been solely for the purpose of suppressing introduction of the movie into evidence. While the rule which prohibits introduction into evidence of material illegally seized is an important guarantee provided by the Fourth Amendment, its purpose is to provide a sanctuary for an individual in his home or habitat. The theory which is the basis for this rule is not present in the instant case in which the evidence was seized within the immediate proximity of the party being arrested in a drive-in theater movie projection booth. (See *Johnson v. Commonwealth*, Ky., 475 S.W. 2d 893 (1971)).

The case of *Lee Art Theater v. Virginia*, 392 U. S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (1968), which was cited by petitioner, is likewise unpersuasive. In the *Lee Arts* case, a film was seized pursuant to a warrant issued solely upon the conclusory affidavit of a police officer, which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard, that the films were obscene. We read the *Lee Arts* case to stand for the principle that the procedure for obtaining a search warrant in that case was defective and not for the proposition that evidence

obtained incident to a lawful arrest cannot be admitted into evidence.

Adoption by this Court of a rule which would require a prior adversary hearing before the arrest and seizure of an obscene film would have the practical effect of opening the door to the showing of hard-core pornography in a theater, while peace officers stand helplessly by awaiting a court ruling. We do not believe that this Court had this in mind in either the *Marcus, Quantity of Books* or *Lee Arts* cases. The better rule is that where a peace officer has viewed the film and has reason to believe that it is obscene, makes an arrest, and seizes the evidence coincidentally with the arrest, such material should be admitted into evidence absent a showing that the action of the officer was part of a pattern of harassment or an abridgement of the right of free speech.

In the present case, the obscenity of the movie was not questioned in the trial court. There is no showing that petitioner moved for a return of the film so that he could continue to have it shown in his theater. Obscenity is not protected under the constitutional right to freedom of speech of the First Amendment (*Roth v. U.S.*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498). The seizure of the obscene film was incidental to a lawful arrest. The Constitution of the United States should not be used as an excuse to avoid conviction for the showing of an admittedly obscene film.

It is therefore apparent that the trial court acted properly in denying petitioner's motion to suppress the evidence and dismiss the indictment.

II

THE CLAIM THAT THE PROSECUTION FAILED TO PROVE THE ELEMENTS ENUNCIATED IN REDRUP V. NEW YORK IN THIS PROSECUTION WAS NOT PROPERLY RAISED BEFORE THE

KENTUCKY COURT OF APPEALS AND IS NOT PROPERLY BEFORE THIS COURT

Petitioner moved for a directed verdict in the trial court and cited *Redrup v. State of New York.* (386 U. S. 767. reh. den. 388 U.S. 1924 (1967)). Petitioner's motion was overruled in the trial court.

On appeal to the Kentucky Court of Appeals, petitioner asked that four questions be reviewed. The two questions germane to this petition may be found on page 37 of Petitioner's Petition for Writ of Certiorari, and it can be seen that in neither question presented was a limited concern for juveniles, an invasion of privacy or pandering mentioned. Petitioner's fourth question, which he later alleged to put the *Redrup* case in issue before the Kentucky Court of Appeals, stated:

> "4. Did the circuit court commit reversible errors in overruling appellant's motions for a directed verdict, and for dismissal of the indictment, when the Commonwealth had neither alleged nor proved the essential element of *scienter*?" (Emphasis added)

After the case had been decided by the Court of Appeals and upon petition for rehearing, petitioner *then* presented the question:

> "4. Was the Commonwealth required to prove the elements of Redrup v. New York, and did this Court, in holding to the contrary, overlook material facts in the record, overlook controlling decisions, and misconceive the law applicable to the issue?"

Section 1.210(a) of the Kentucky Rules of the Court of Appeals states:

> "The brief of the appellant shall contain the following matter, under the designated main headings, arranged in the following order:
> . . .
> (a) A STATEMENT OF THE QUESTIONS PRESENTED, which shall state in the clearest and briefest

form, and separately number, each of the principal questions involved on the appeal. *The Court will not consider*, except for special cause, *questions not so set forth.*" (Emphasis added)

Section 1.350(b) of the Kentucky Rules of the Court of Appeals states:

"Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on appeal . . . ."

The Kentucky Court of Appeals in 1960 held in *Herrick v. Wills*, Ky., 333 S.W.2d 275, 276:

"The function and scope of a petition for rehearing is set forth in RCA 1.350. Section (b) of that Rule specifically provides that a petition for rehearing 'shall be limited to a consideration of the issues argued on the appeal . . . .'

It is incumbent upon the appellant to present to this Court before submission all of his grounds for reversal. Questions decided by the trial court, but not argued in the briefs, will not be considered by the Court of Appeals . . . .

Those to be raised on appeal should be identified separately, and that is one reason why the Points and Authorities required by RCA 1.210 are important. . . ."

Since the Redrup question was not properly brought before the Kentucky Court of Appeals, the Opinion of the Court does not show its consideration, and since the Petition for Rehearing was not the proper action for this consideration under Kentucky Rules of Procedure, the Petition for Rehearing was denied.

It is therefore apparent that this Court should not grant the Petition for Writ of Certiorari requested by petitioner based upon the Redrup decision, since that issue was not properly brought before the Kentucky Court of Appeals. *Beck v. Washington*, 369 U. S. 541, 8 L.Ed.2d 98, 82, S.Ct. 955; *Street v. New York*, 394 U. S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354.

Even if petitioner had properly brought this matter before the Kentucky Court of Appeals, it is contended by respondent that the *Redrup* decision does not mean that the State must allege and prove a limited concern for juveniles, an assault on privacy, or pandering.

The *Redrup* decision can and should be interpreted as meaning that in cases where there is a close question of whether the material is obscene, vel non, the courts may use the tests in *Redrup* in determining that the public must be protected from such material. This Court is not faced with a close question of obscenity, since the question of whether the material was obscene was not questioned in this Petition.

If the prosecution of obscenity cases were limited to the three tests enumerated in the *Redrup* case, the floodgates would be opened to the showing of "hard core stag films" in movie theaters. It is therefore apparent that petitioners' reliance on the *Redrup* decision for certiorari should not be granted.

CONCLUSION

The Kentucky Court of Appeals under the facts in this case properly decided that obscene material which has been seized incidental to a lawful arrest can be admitted into evidence without a prior adversary hearing. There is therefore no substantial federal question on this issue which should be reviewed by this Court.

The issues in *Redrup v. New York*, supra, were not properly brought before the Kentucky Court of Appeals for a decision and therefore should not be subject to review by this Court. Even if *Redrup* were applied, however, the elements listed in *Redrup* should not be used as a means of inhibiting state prosecution in obscenity cases.

For the reasons stated above, it is respectfully contended by the Commonwealth of Kentucky that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR
RESPONDENT

PROOF OF SERVICE

I, Robert V. Bullock, one of counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 31st day of March, 1972, I served a copy of the Brief for Respondent in Opposition on Phillip K. Wicker, 120 North Main Street, Somerset, Kentucky 42501, Attorney for Petitioner, by mailing a copy in a duly addressed envelope with first class postage prepaid, to said attorney at the above address.

Robert V. Bullock

Robert V. Bullock